[Cite as *State v. Conley*, 2015-Ohio-2553.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26359
v.	:	T.C. NO. 13CR3453
JEREMY L. CONLEY	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . .

OPINION

Rendered on the 26th day of June, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Jeremy L. Conley appeals from his conviction and sentence for one count of felonious assault (deadly weapon), in violation of 2903.11(A)(2), a felony of the second degree. Conley filed a timely notice of appeal with this Court on August 20, 2014.

{¶ 2} The victim in this case is Phillip Allison, the owner and operator of a towing business named Big Worm Towing, L.L.C. Allison and Conley were childhood friends, and at one point, the two men lived together. However, their friendship ended approximately fifteen years ago when Conley allegedly stole Allison's tools. Allison confronted Conley about the theft, but the tools were never returned.

{¶ 3} With that background, the incident which forms the basis for the instant appeal occurred at approximately 3:00 p.m. on August 28, 2013, at Mike's Auto Parts (hereinafter "Mike's"), a junkyard/mechanic shop, located at 8201 West Third Street in Trotwood, Ohio. Allison was in the process of dropping off a vehicle that he had just towed when he observed Conley working on another vehicle at Mike's. The owner of Mike's, Mike Horvath, testified that he had previously hired Conley to do odd jobs around the shop.

{¶ 4} After securing the vehicle he had towed to Mike's, Allison exited his truck and approached Conley to speak with him about the stolen tools. Initially, Conley pretended not to recognize Allison. Allison persisted, asking Conley how he was "going to make it right." Conley replied, "I don't owe you nothing." Allison told Conley that he was going to call Horvath and "let [him] know who you are and what you are about." Allison and Conley exchanged more heated words until John Pease, another employee at Mike's, came outside and told them to quiet down and stop arguing. Pease testified that they ignored him and kept arguing.

{¶ 5} Allison finished unhooking the vehicle from his tow truck and then went into the office and called Horvath. While Allison was talking to Horvath, Conley walked up and stood next to Pease. Pease testified that Conley stated that "if [Allison] keeps

talking, I'm going to hit him in the head with this crowbar." Pease further testified that Conley was referencing a crowbar that had been placed against the wall in the garage near the men. Pease warned Conley not to attack Allison before going back into the garage to work on another vehicle.

{¶ 6} When Allison was finished talking to Horvath, he approached Conley and told him that he needed to leave the premises. Thereafter, the two men began arguing again. The argument quickly escalated into both men grabbing and shoving each other. Allison fell backwards into a vehicle being repaired in the garage. Conley then picked up the crowbar he mentioned to Pease earlier and struck Allison in the forehead area sending him back against the vehicle, leaving a dent in it. Allison stood up and grabbed an axle that was laying nearby, intending to strike Conley. Another employee, Dennis Liffick, told Allison to put the axle down and that "it wasn't worth it." Apparently heeding Liffick's advice, Allison put the axle down while an unidentified employee called the police.

{¶ 7} When it was announced that the police were en route, Conley threw down the crowbar, got in his vehicle, and quickly left the auto shop. Conley did not return to Mike's that day. The police arrived shortly thereafter. Allison suffered a large bruise on his forehead and complained of a severe headache. Nevertheless, Allison refused medical care at the scene and attempted to drive his tow truck back to his residence. However, Allison became dizzy while driving home and his wife took him up to the emergency room at Kettering Medical Center. At the hospital, Allison underwent testing to assess the extent of his injury. Although he was released later that same evening, Allison testified that he was unable to work for the next two or three days.

{¶ 8} On January 10, 2014, Conley was indicted for one count of felonious assault with a deadly weapon. At his arraignment on January 23, 2014, Conley stood mute, and the trial court entered a plea of not guilty on his behalf. A jury trial was held on July 23 and July 24, 2014. The jury returned a guilty finding for felonious assault with a deadly weapon. On August 12, 2014, the trial court sentenced Conley to ninety days in the Montgomery County Jail and five years of community control. The trial court also ordered Conley to pay $600.00 in restitution to Allison.

{¶ 9} It is from this judgment that Conley now appeals.

{¶ 10} Conley's first assignment of error is as follows:

{¶ 11} "APPELLANT'S CONVICTION FOR FELONIOUS ASSAULT IS BASED UPON INSUFFICIENT EVIDENCE."

{¶ 12} In his first assignment, Conley contends that his conviction for felonious assault is not supported by sufficient evidence. Specifically, Conley argues that the testimony adduced at trial was unclear regarding whether he struck Allison with a crowbar. Conley also asserts that the State adduced insufficient evidence to establish that a crowbar was used as a deadly weapon.

{¶ 13} "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " (Citations omitted). *State v. Crowley*, 2d Dist. Clark No. 2007 CA 99, 2008-Ohio-4636, ¶ 12.

{¶ 14} In the instant case, the State was required to prove each and every element of felonious assault with a deadly weapon, pursuant to R.C. 2903.11(A)(2), which states

in pertinent part:

> (A) No person shall knowingly: (2) [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon ***.

{¶ 15} R.C. 2901.22(B) defines "knowingly" as follows:

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature.

{¶ 16} "Deadly weapon" is defined in R.C. 2923.11(A) as follows:

> Deadly weapon means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon.

{¶ 17} Allison unequivocally testified that Conley was the individual who struck him in the head him with a crowbar at Mike's auto shop at approximately 3:00 p.m. on August 28, 2013. Pease testified that immediately before the attack, Conley stated that "he was going to hit Allison in the head with crowbar." Pease testified that after the initial verbal exchange between the two men, he personally witnessed Conley grab the crowbar and hit Allison in the forehead with it. Before this, Pease saw no blows between the two men. Upon being struck, Allison fell backwards into a vehicle. Although Liffick did not witness Conley hit Allison with the crowbar, he testified that he did observe Conley holding the crowbar after Allison fell backwards into the parked car. Moreover, Pease, Liffick, and Detective Mike Pigman of the Trotwood Police Department each testified that they personally observed that Allison had a large abrasion or "knot" on his forehead.

{¶ 18} Furthermore, the State adduced sufficient evidence that the crowbar used

in the attack was a deadly weapon, thereby capable of inflicting death. See *State v. Thornton*, 2d Dist. Montgomery No. 20652, 2005-Ohio-3744, ¶ 18. Allison testified that the crowbar was the length "of [his] arm" and made out of heavy metal so that it would not break when used. Immediately after being struck, Allison's forehead swelled up and began to bruise. Although he refused medical treatment at the scene, Allison testified that the blow from the crowbar caused him to suffer a debilitating headache. Allison also testified that the swelling caused by the blow made it difficult to open his left eye. Upon attempting to drive his tow truck home from Mike's, Allison became very dizzy and was taken to the hospital by his wife. Allison went to the emergency room and received pain medication. Allison also missed two-three days of work because of the pain from the blow from the crowbar. At the time of trial, Allison testified that he still suffered some pain from being struck with the crowbar. Accordingly, we conclude from this evidence that a crowbar, such as the one used herein, could cause death, and a reasonable juror could conclude that the State established the element of a deadly weapon since the evidence established that Conley used the crowbar to strike Allison in the head. Thus, a review of the record convinces us that the State's evidence, taken in its entirety, was sufficient to sustain Conley's conviction for felonious assault with a deadly weapon.

{¶ 19} Conley's first assignment of error is overruled.

{¶ 20} Conley's second assignment of error is as follows:

{¶ 21} "THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE CONSCIOUSNESS OF GUILT INSTRUCTION (FLIGHT INSTRUCTION)."

{¶ 22} In his second assignment, Conley argues that the trial court erred when it instructed the jury regarding "flight" because he asserts that the State adduced no

evidence that he attempted to flee the scene after he attacked Allison and the police were called.

{¶ 23} In *State v. Wood*, 2d Dist. Clark No. 2010 CA 42, 2011-Ohio-2314, ¶ 30, we stated that it has been "universally conceded that the fact of accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself." *Id.*, citing *State v. Stevens*, 2d Dist. Montgomery No. 16509, 1998 WL 151107 (April 3, 1998). Evidence of flight to support an inference of guilt should generally be limited to situations when the activities associated with flight occur at a time and place near the criminal activity for which the defendant is on trial. *State v. Frock*, 2d Dist. Clark No. 2004 CA 76, 2006-Ohio-1254, ¶ 57.

{¶ 24} The trial court gave the following instruction to the jury:

> Testimony has been admitted indicating that the Defendant fled the scene of the incident, located in Montgomery County, Ohio. You are instructed that fleeing the scene alone does not raise a presumption of guilt, but it may tend to indicate the Defendant's consciousness or awareness of guilt. If you find that the facts do not support that the Defendant fled the scene, or if you find that some other motive prompted the Defendant's conduct or if you were unable to decide what the Defendant's motivation was, then you should not consider this evidence for any purpose.
>
> However, if you find that the facts support that the Defendant engaged in such conduct and if you decide that the Defendant was motivated by a consciousness or awareness of guilt, you may but are not

required to consider that evidence in deciding whether the Defendant is guilty of the crime charged. You alone with [sic] determine what weight, if any, to give to this evidence.

{¶ 25} After a thorough review of the record, we conclude that the trial court did not err when it instructed the jury regarding Conley's flight from the scene of the attack. The evidence established that Conley fled from Mike's immediately after striking Allison with the crowbar when he apparently became aware that the police had been called to the scene. Specifically, Allison testified that upon one of the employees announcing that the police were coming, Conley threw the crowbar out into the parking lot, got in his car, and "squealed his tires out of there." Conley's flight was therefore, contemporaneous with his commission of the crime of felonious assault with a deadly weapon. *Wood*, at ¶ 33. It is also significant that after he fled following the attack, Conley did not return to Mike's that day. In our view, the evidence adduced at trial warranted the flight instruction given by the trial court. Thus, the instruction on consciousness of guilt was proper, and the trial court did not err by instructing the jury regarding Conley's immediate flight from the scene of the felonious assault.

{¶ 26} Conley's second assignment of error is overruled.

{¶ 27} For the purposes of convenience, we will address the assignments of error out of order. Conley's fourth assignment of error is as follows:

{¶ 28} "THE TRIAL COURT ERRED IN NOT INSTRUCTING THE JURY ON THE INFERIOR DEGREE OFFENSE OF AGGRAVATED ASSAULT AND THE LESSER INCLUDED OFFENSE OF ASSAULT."

{¶ 29} In his fourth assignment, Conley argues that the trial court committed plain

error when it failed to sua sponte instruct the jury on the inferior degree offense of aggravated assault and the lesser included offense of assault. It is undisputed that Conley failed to request instructions on either aggravated assault or simple assault, so all but plain error has been forfeited. *State v. Lott*, 51 Ohio St.3d 160, 167, 555 N.E.2d 293 (1990).

{¶ 30} For plain error to exist, the defect in the trial proceedings must be obvious and must have affected the outcome of the trial. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 16. "Notice of plain error 'is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 108, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 31} A. Aggravated Assault Instruction

{¶ 32} "In *State v. Deem*, 40 Ohio St.3d 205, 210, 533 N.E.2d 294 (1988), the Ohio Supreme Court held that aggravated assault is not a lesser-included offense of felonious assault. Rather, aggravated assault is an 'inferior-degree offense,' as it contains elements which are identical to the elements defining felonious assault, except for the additional mitigating element of serious provocation. Nevertheless, 'in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, an instruction on aggravated assault must be given to the jury.' *Id.* at syllabus." *State v. Morrow*, 2d Dist. Clark No. 2002-CA-37, 2002-Ohio-6527, ¶ 7, fn.2.

{¶ 33} Specifically, felonious assault is reduced to aggravated assault if the offender is "under the influence of sudden passion or in a sudden fit of rage *** brought on

by serious provocation occasioned by the victim." R.C. § 2903.12(A); *Deem*, 40 Ohio St.3d at 210-211, 533 N.E.2d 294. "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress[,] and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force." *Id.* at 211, 533 N.E.2d 294.

{¶ 34} "In a case in which there is conflict in the testimony and the defendant has a reasonable hope that the jury will believe his evidence and return a verdict of not guilty, it is a matter of trial strategy whether to seek to have the jury instructed concerning a lesser-included offense, or not to seek such an instruction and to hope for an acquittal." *State v. Caitlin*, 56 Ohio App.3d 75, 78-79, 564 N.E.2d 750 (2d Dist.1990). However, as recently stated by the Ohio Supreme Court, trial strategy cannot prevent an instruction on a lesser included offense where the evidence warrants it. *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207. Even so, as we recently noted in *State v. Pullen,* 2d Dist. Montgomery No. 25829, 2015-Ohio-552, ¶24, fn.2, *Wine* is distinguishable from the instant case because the context there was different. Specifically, the defendant in *Wine* argued that the trial court had erred in *giving* a lesser-included-offense instruction. *Wine* did not involve a situation, like the present case, where the issue was whether the trial court had committed plain error in *not giving* a lesser-included-offense instruction. In *Wine*, the Ohio Supreme Court found this difference in context "crucial." *Wine*, 2014-Ohio-3948, at ¶ 26.

{¶ 35} During the trial, defense counsel argued that Conley did not strike Allison in the head with a crowbar. Rather, defense counsel attempted to establish through cross-examination that while the two men were arguing and grabbing each other, Allison somehow fell and accidentally hit his head on something in the garage. Specifically, in

closing, defense counsel argued that the evidence only established that Allison "could have hit his head on the car," *** "[h]e could have hit his head on a piece of equipment," *** or "somebody could have elbowed him."

{¶ 36} Therefore, it is evident that an instruction on the inferior-degree offense of aggravated assault would conflict with the defense theory that Allison's injuries were inadvertent and not caused by Conley striking Allison with the crowbar. After reviewing the evidence, we conclude that the trial court was not required to instruct on aggravated assault. *See State v. Hancock*, 2d Dist. Montgomery No. 19434, 2005-Ohio-127, ¶ 25. Furthermore, the evidence adduced by the State is inconsistent with an aggravated assault. Accordingly, we find that the evidence does not support both an acquittal on the greater charge and a conviction on the inferior charge. Thus, the trial court did not err, plainly or otherwise, when it failed to give an instruction on the inferior-degree offense of aggravated assault.

{¶ 37} B. Simple Assault Instruction

{¶ 38} The same analysis in section (A), above, applies with respect to Conley's argument regarding the failure of the trial court to instruct the jury on the lesser included offense of simple assault. With respect to felonious assault charged under R.C. 2903.11(A)(2), a person is guilty of that offense when he knowingly causes "physical harm to another *** by means of a deadly weapon ***." A person is guilty of simple assault under R.C. 2903.13(B) when he recklessly causes serious physical harm to another. R.C. 2901.22 defines the culpable mental states of "knowingly" and "recklessly" as follows:

> (B) A person acts knowingly, regardless of his purpose, when he is aware

> that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.
>
> (C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶ 39} Conley's theory of the defense was that he did not strike Allison in the head with a crowbar, and therefore, did not cause the injuries to his forehead. The jury could not have reasonably rejected the essentially uncontroverted evidence of the use of a deadly weapon. As previously stated, Conley argued that Allison could have accidentally hurt himself while the two men grabbed at each other. Conley's theory of the defense suggests that he acted neither knowingly nor recklessly, because he maintained that he did not cause Allison's injuries. *State v. Fuller*, 2d Dist. Montgomery No. 20658, 2005-Ohio-3696, ¶ 19. Furthermore, the account provided by Allison and Pease does not support an assault instruction. Thus, the trial court did not err when it failed to instruct the jury on simple assault as a lesser included offense of felonious assault with a deadly weapon.

{¶ 40} Conley's fourth assignment of error is overruled.

{¶ 41} Conley's fifth assignment of error is as follows:

{¶ 42} "THE TRIAL COURT ERRED IN ORDERING RESTITUTION WITHOUT A

HEARING."

{¶ 43} In his fifth assignment, Conley argues that the trial court erred when it ordered him to pay Allison restitution in the amount of $600.00 without first holding a hearing pursuant to R.C. 2929.18. Conley also asserts that the trial court failed to consider his present and future ability to pay before ordering restitution.

{¶ 44} The record establishes that at disposition, defense counsel objected to the amount of the restitution order and requested a hearing. The trial court stated that the amount constituted income lost by Allison for the time he missed work because of the injury caused by Conley. At this point, the State orally provided a cursory explanation of the method used to calculate the restitution amount. The trial court noted the continuing objection to the restitution amount and then directed defense counsel to "file a motion" if it wanted a hearing on the issue. The record establishes that defense counsel did not file a motion requesting a restitution hearing, however, an objection was timely made.

{¶ 45} A trial court abuses its discretion when it orders restitution that does not bear a reasonable relationship to the actual financial loss suffered. *State v. Williams*, 34 Ohio App.3d 33, 35, 516 N.E.2d 1270 (2d Dist.1986). Therefore, we review a trial court's order of restitution under an abuse of discretion standard. *See State v. Naylor,* 2d Dist. Montgomery No. 24098, 2011-Ohio-960, ¶22. "The abuse of discretion standard is defined as '[a]n appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.' " *State v. Boles,* 2d Dist. Montgomery No. 23037, 2010-Ohio-278, ¶18, quoting Black's Law Dictionary, Eighth Edition (2004), at 11.

{¶ 46} R.C. 2929.18(A)(1) allows a trial court to order, as a financial sanction, an

amount of restitution to be paid by an offender to his victim "based on the victim's economic loss. * * * If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense."

{¶ 47} A hearing is required only "if the offender, victim, or survivor disputes the amount of restitution ordered by the court." *State v. Wilson,* 2d Dist. Montgomery No. 23167, 2010-Ohio-109, ¶21, citing R.C. 2929.18(A)(1). Contrary to the trial court's directive in the instant case, there is no requirement in R.C. 2929.18 that a defendant file a written motion requesting a restitution hearing.[1] Defense counsel properly objected to the restitution order and requested a hearing. Pursuant to R.C. 2929.18, the trial court was therefore, required to hold a hearing in order to properly determine the amount of restitution, if any, to be paid to the victim, Allison. Thus, we conclude that the trial court abused its discretion in ordering restitution without holding a hearing as timely requested by Conley's counsel at disposition. By all indications, it was the first time that Conley learned of the requested amount.

{¶ 48} Conley also claims that the trial court failed to consider his ability to repay the victim before ordering restitution. The record does not support his claim.

{¶ 49} R.C. 2929.19(B)(5) imposes a duty upon the trial court to "consider the

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[1] We note that the trial court imposed the restitution order at Conley's sentencing hearing held on August 12, 2014. Only two days later, on August 14, 2014, the trial court issued Conley's judgment entry of conviction, thus providing scant time for defense counsel to file a motion requesting a restitution hearing.

offender's present and future ability to pay" before imposing any financial sanctions under R.C. 2929.18. *See State v. Martin,* 140 Ohio App.3d 326, 338, 747 N.E.2d 318 (4th Dist.2000). However, the statute establishes no particular factors for the court to take into consideration, nor is a hearing necessary before making this determination. *Id.* Moreover, although it is preferable, a court imposing financial sanctions need not expressly state on the record that it considered an offender's ability to pay. *State v. Parker*, 2d Dist. Champaign No. 03CA0017, 2004-Ohio-1313, ¶42. Where the trial court fails to make an explicit finding on a defendant's relative ability to pay, this court has observed that a trial court's consideration of this issue may be "inferred from the record under appropriate circumstances." *Id.*

> In *State v. Ayers*, 2d Dist. Greene No. 2004CA0034, 2005-Ohio-44, this court held a trial court's order of restitution was contrary to law because there was nothing in the record indicating the trial court considered the defendant's ability to pay the ordered amount. Information contained in a presentence investigation report relating to defendant's age, health, education and employment history, coupled with a statement by the trial court that it considered the presentence report, has been found sufficient to demonstrate that the trial court considered defendant's ability to pay a financial sanction. (Citations omitted) Here, although the trial court stated that it had reviewed the presentence report, that document has not been included in the files and records presented to this court. Neither does the State rely on its contents to refute Defendant's contention. Without knowledge of the contents of that presentence report, we cannot infer from

> it that the trial court considered Defendant's present and future ability to pay a financial sanction.

Ayers, at ¶25.

{¶ 50} In the instant case, both the sentencing transcript and the judgment entry of conviction indicate that the trial court considered the PSI report prior to ordering Conley to pay restitution. Additionally, we have reviewed the contents of Conley's PSI, and it contains information about his age, health, education, and work history. There is nothing in the PSI indicating that Conley would be unable to work upon his release from jail while on community control. Conley is young, thirty-six years old, has a tenth grade education, and is healthy. Conley also has a demonstrated work history at Goodyear Tires, and Kroger. Therefore, in the absence of any evidence suggesting otherwise and no objection to ability to pay at the trial level, we find that the trial court considered Conley's ability to pay when it ordered restitution.

{¶ 51} Conley's fifth assignment of error is sustained in part and overruled in part.

{¶ 52} Conley's third assignment of error is as follows:

{¶ 53} "APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT THEREBY DENYING APPELLANT A FAIR TRIAL."

{¶ 54} In his third assignment, Conley argues that his trial counsel was deficient for the following reasons, to wit: 1) trial counsel failed to present evidence of self-defense and withdrew a request for a jury instruction on self-defense ; 2) trial counsel should have requested that the trial court instruct the jury on the inferior degree offense of aggravated assault and the lesser included offense of assault; and 3) trial counsel should have filed a

motion requesting a restitution hearing after the sentencing hearing.

{¶ 55} "We review the alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley* (1989), 42 Ohio St.3d 136, * * * . Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.* Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." (Internal citation omitted). *State v. Mitchell*, 2d Dist. Montgomery No. 21957, 2008-Ohio-493, ¶ 31.

{¶ 56} An appellant is not deprived of effective assistance of counsel when counsel chooses, for strategic reasons, not to pursue every possible trial tactic. *State v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988). The test for a claim of ineffective assistance of counsel is not whether counsel pursued every possible defense; the test is whether the defense chosen was objectively reasonable. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy. *State v. Smith*, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). Debatable

strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available. *State v. Cook*, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992).

{¶ 57} A. Self-Defense Instruction

{¶ 58} Initially, we note that trial counsel stated in its opening statement that Conley's defense to the felonious assault charge would be self-defense. However, as the trial progressed, defense counsel decided to abandon its decision to pursue the affirmative defense of self-defense in favor of an effort to impeach the witnesses' testimony regarding their observations. They asserted that, based on the nature of his injuries, Allison could not have been struck in the head with a crowbar. Specifically, the defense focused on Liffick's testimony that, in his experience, "[i]f you're getting hit in the head with a crowbar, you're going to get cut." Defense counsel argued that the State failed to establish that a crowbar was the cause of Allison's injuries because his forehead did not get cut, and he only suffered from bruising and swelling. In closing, defense counsel argued that the evidence only established that Allison "could have hit his head on the car," *** "[h]e could have hit his head on a piece of equipment," *** or "somebody could have elbowed him." Al of this is speculative and not supported by the evidence.

{¶ 59} As previously discussed, Conley informed Pease that he was going to hit Allison in the head with the crowbar before doing so. After Allison spoke with Horvath on the telephone, he told Conley that he needed to leave the auto shop. The two men argued and began grabbing each other. Allison then fell into a parked vehicle backwards. Thereupon, Conley picked up the crowbar that he had just pointed out to Pease and struck Allison in the head just as he said he would. To support a claim for

self-defense, a defendant must demonstrate that he acted out of fear or he felt that his life was threatened. *State v. Crawford*, 2d Dist. Montgomery No. 22314, 2008-Ohio-4008, ¶ 26. Simply put, the evidence adduced during trial did not support the argument that Conley acted in self-defense, and defense counsel could have reasonably decided that a self-defense instruction was not warranted. Thus, defense counsel's decision to withdraw its request for an instruction on self-defense was a tactical decision and did not amount to ineffective assistance.

{¶ 60} B. Aggravated Assault Instruction / Simple Assault Instruction

{¶ 61} Conley's counsel could have reasonably decided not to request an aggravated assault instruction under the evidence presented with the hope of attaining a complete acquittal for felonious assault with a deadly weapon. During the trial, defense counsel's strategy involved arguing that Conley did not strike Allison in the head with a crowbar. Instead, defense counsel attempted to establish that while the two men were arguing and grabbing each other, Allison somehow fell and accidentally hit his head on something in the garage. Thus, it may have reasonably been defense counsel's belief that an instruction on the inferior-degree offense of aggravated assault would conflict with the theory that Allison's injuries were accidental and not caused by Conley. By failing to request an instruction on aggravated assault, defense counsel may have simply been trying to avoid confusing the jury and undermining Conley's defense that the crowbar did not cause Allison's injury. The analysis we applied in assignment of error IV also applies here regarding why the evidence does not support an instruction on aggravated assault.

{¶ 62} The same analysis applies with respect to Conley's argument regarding the failure of defense counsel to request an instruction on the lesser included offense of

simple assault. Conley's theory of the defense was that he did not strike Allison in the head with a crowbar, and therefore, did not cause the injuries to his forehead. Rather Conley argued that Allison could have accidentally hurt himself as the two men grabbed at each other, striking his head on a piece of equipment. Conley's theory of the defense suggests that he did not act knowingly, because his conduct did not cause Allison's injuries, and a crowbar would have caused more damage. *State v. Fuller*, 2d Dist. Montgomery No. 20658, 2005-Ohio-3696, ¶ 19. Accordingly, it was reasonable for defense counsel to not request an instruction on simple assault as a lesser included offense of felonious assault in order to avoid confusing the jury and undermining Conley's theory of the case.

{¶ 63} Finally, the record does not disclose any articulated reason for defense counsel's failure to request an instruction on aggravated assault and/or simple assault. *See Crawford*, ¶ 30. Thus, we will presume that counsel was motivated by trial strategy and did not render ineffective assistance of counsel.

{¶ 64} D. Failure to File a Motion for a Restitution Hearing

{¶ 65} As stated in our discussion of the fifth assignment of error, defense counsel's objection to the restitution order and request for a hearing was sufficient under R.C. 2929.18 to require the trial court to hold a restitution hearing. In this respect, the ineffective assistance of counsel claim is rendered moot.

{¶ 66} Conley's third assignment of error is overruled.

{¶ 67} Conley's fifth assignment of error having been sustained in part, the order of restitution is reversed, and this cause is remanded for a hearing on the amount of restitution only. In all other respects, the judgment of the trial court is affirmed.

. . . .

FROELICH, P.J. and FAIN, J., concur.

Copies mailed to:

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